course which was open to them of applying to the probate officer for the revocation of the grant (see *Liaw* v. *Blikas*[9]).

The defendant alleged that she had submitted her accounts regularly as requested by the court to the probate officer until 1953 when the probate officer told her not to do so.

The Public Trustee (DW1) informed the court that the files in respect of the estate were in a mess and the true position cannot be ascertained.

In my judgment as the right to vary is nowhere expressly conferred to the probate officer by law, no one has a power to vary the order of the court.

However, I find it unnecessary to decide the other points raised as I have reached a conclusion in the defendant's favour on other grounds.

For these reasons, I find in favour of the defendant with costs.

Judgment accordingly.

AMERICAN INTERNATIONAL ASSURANCE CO. LTD. v. UNION BUILDERS (MALAYSIA) SDN. BHD.

[F.C. (Ong C. J. (Malaya), Gill and Ali FJJ.) May 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 18 of 1971]

Land Law — Charge — Default in payment of instalments and interest — Notice of default in Form 16D — Order for sale — Rate of interest from date of order to date of payment — National Land Code, s. 242 and 254.

The appellant in this case were the chargees of certain lands on the security of which the respondent was given a loan of $1,250,000 bearing interest at 11% per annum. The respondent defaulted in payment of a number of instalments and interest and notice of default was given as in form 16D under section 294 of the National Land Code. Subsequently an order for the sale of the lands was made by the High Court to recover the sum of $1,401,596.24 due to the appellants as on the August 31, 1970, together with interest at the rate of 11% per annum from September 1, 1970, to the date of order and further interest at the rate of 6% per annum to the date of payment or realization. The appellants appealed against the order of the High Court in so far as it related to the payment of interest at 6% from the date of the order. They claimed the payment of full interest at 11% until date of realization of the security. The respondent cross-appealed on the ground that the notice of default in Form 16D was bad in law.

Held: (1) as the appellant's claim as chargees in this case was not on the covenant but in exercise of their statutory remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to interest at the agreed rate, that is, 11% until realization of the security;

(2) the notice in form 16D was valid.

Cases referred to:-

(1) *Ex parte Fewings* [1883] 25 Ch. D. 338, 355.

(2) *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147, 149.

(3) *Mary Michael* v. *United Malayan Banking Corporation Ltd.* [1971] 1 M.L.J. 172.

FEDERAL COURT.

K. Thayalan for the appellants.

Edward T. T. Lim for the respondents.

Ong C.J. (Malaya): The appellants are the chargees of certain lands on the security whereof the chargor was given a loan of $1,250,000 bearing interest at 11 per cent per annum. The charge was effected by an instrument in Form 16A, under section 242 of the National Land Code. The chargor defaulted in the payment of a number of instalments, as well as interest. Notice of default was duly given as in Form 16D under section 254. On February 18, 1971 an order was made by the High Court at Kuala Lumpur for the sale of the lands comprised in the charge to recover the sum of $1,401,596.24 due to the chargees as on August 31, 1970 together with interest thereon at the rate of 11 per cent per annum from September 1, 1970 to the date of order and further interest thereafter at the rate of 6 per cent per annum to the date of payment or realisation. By the same order of court the public auction was fixed for May 15, 1971 and other directions relating to the sale left to be settled by the Senior Assistant Registrar. The chargees' costs were to be taxed as between solicitor and client.

The chargees have appealed against that decision in so far as it relates to the payment of interest at 6 per cent from the date of the order. Their claim is for full interest at 11 per cent until date of realisation of their security.

The chargor has also cross-appealed on the ground that the Notice of Default in Form 16D was bad in law. It is also contended that the judge should have exercised his discretion by ordering that the costs be taxed as between party and party instead of solicitor and client.

As regards the appeal by the chargees, I must say, with all respect, that I think it should be allowed. In awarding the lesser interest from the date of his order, the judge purported to follow the judgment of Fry L.J. in *Ex parte Fewings*[1] as follows: —

"When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment."

The passage above was quoted with approval by the Earl of Halsbury L.C. in *Economic Life Assurance Society* v. *Usborne*[2] but, read by itself, it did not, perhaps, sufficiently clarify the distinction between a judgment given on a simple claim for a debt and a claim upon a mortgage. As Lord Davey said (on pages 152 and 154) in the same case: —

"... when a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment.... (But) once come to the conclusion that the mortgage is in such a form that the property mortgaged cannot be taken out of the hands of the mortgagee without payment of the principal and full interest, then the covenant has no more to do with it than if it related to another subject-matter altogether."

The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that section 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows: —

"(c) Thirdly, in the payment to the chargee of the *total amount due under the charge at the time of sale;*"

The words in italics, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale. I would accordingly allow the chargees' appeal and direct that the order of court dated February 18, 1971 be amended to allow interest on the sum then due at the rate of 11 per cent per annum until the date of sale.

As regards the cross-appeal I must say, with respect, that there are no merits in the arguments put forward to detain us for more than a moment. First, the validity of the notice in Form 16D is no longer open to question since the decision of this court in *Mary Michael's* case.[3] In this connection it was further argued that the notice of default was not such a notice of demand as conformed with the express terms of the agreement between the parties as set out in clauses 1 and 3 of the charge. In my view the simple answer is to be found in clause 8 providing that in the events which happened "it shall be lawful for the chargee forthwith to give notice to the chargor under section 254 of the National Land Code etc."

Finally as regards the question of costs I need only add that, in clause 9(5), costs as taxed between solicitor and client had been expressly agreed to and the judge was perfectly entitled to make an order in terms. The cross-appeal is accordingly dismissed, but, having regard to all the circumstances, I think it will be sufficient that the appellants do have the costs of the appeal as taxed between party and party.

Gill and **Ali F.JJ.** concurred.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Messrs Skrine & Co.; Messrs Lim & Hoh.*

KARUPPIAH PILLAI v. KAKA SINGH

[A.C.J. (Suffian F.J.) December 10, 1971]

[Kuala Lumpur — Raub Civil Appeal No. 1 of 1970]

Moneylenders — Loan interest free to friend — Failure to comply with statutory requirements — No note or memorandum in writing — Whether contracts enforceable — Moneylenders Ordinance, 1951, s. 16(1).

The plaintiff (respondent in this case) was a moneylender. He lent money to his friend the defendant (appellant) on three separate occasions without interest. On each occasion he took a cheque from the defendant as security, and on no occasion was a note or memorandum in writing of the contract ever signed by the parties. When the defendant failed to repay him, the plaintiff sued him and the learned president allowed his claim. The defendant appealed.

Held, allowing the appeal: as each of these loans was a contract for the repayment by a borrower of money lent to him by a moneylender within the meaning of section 16(1), of the Moneylenders Ordinance, 1951, and as there was no note or memorandum in writing of the contract ever signed by the parties, none of these contracts could be enforced.

The following cases were cited in argument: *Leong Poh Chin* v. *Chin Thin Sin* [1959] M.L.J. 246 and *Nasib Singh* v. *Ramasamy* [1969] 1 M.L.J. 211.

CIVIL APPEAL.

E. V. Devadason for the appellant.

Balwant Singh for the respondent.

Suffian F.J.: The plaintiff (respondent) lent $1,700 to the defendant (appellant). The defendant did not pay, and so the plaintiff sued him. The plaintiff won, and the defendant has appealed to this court

The main ground of appeal has to do with subsection (1) of section 16 of the Moneylender's Ordinance No. 42 of 1951. The material part of that subsection provides —

"No contract for the repayment by a borrower .... of money lent to him ... by a moneylender ... after the commencement of this Ordinance ... and no security given by the borrower ... in respect of such contract, shall be enforceable unless a note or memorandum in writing of the contract ... be signed by the parties to the contract...."

The facts as found by the learned president were that the plaintiff was at the material time a licensed moneylender (he admitted it), that he lent money to the defendant on three separate occasions without interest, that on each occasion he took a cheque from the defendant as security, and that on no occasion was a note or memorandum in writing of the contract ever signed by the parties. The learned president nevertheless gave judgment for the plaintiff on the ground that each of the loans was a friendly loan. He rejected counsel for the defendant's argument that as the plaintiff was admittedly a moneylender the transactions were caught by subsection (1) of section 16 and, there being no written note or memorandum of the contracts signed by the parties, they were not enforceable.

The same argument was advanced before me by Mr. Devadason for the defendant, but neither counsel was able to produce any authority in support of or in opposition to this argument. During the course of the argument I asked this question: if the plaintiff had lent money interest free to his father or brother, could he not recover if in fact there was no written note or memorandum of the transaction? Mr. Devadason sub-